STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 32, Charging Party, v. BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5508-E PERB Decision No. 2385 June 30, 2014

Appearances: Christina C. Bleuler, Attorney, for California School Employees Association & its Chapter 32; Law Offices of Eric Bathen by Eric Bathen, Attorney, for Bellflower Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association & its Chapter 32 (CSEA) and by the Bellflower Unified School District (District) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The ALJ concluded that the District had violated the Educational Employment Relations Act (EERA)[1] when it failed to bargain in good faith over the effects of its decision to close Las Flores Elementary School (Las Flores) and abolish the positions of classified employees represented by CSEA. The ALJ also concluded that CSEA had failed to establish that the District unilaterally implemented a layoff or reduced the hours of CSEA bargaining unit members. In addition, having determined that CSEA had failed to establish that any of its bargaining unit members had been improperly

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

laid-off by the District, the ALJ also declined CSEA's request for a make-whole remedy to compensate those employees.

We have reviewed the entire record in this matter including the proposed decision, the record of the hearing, both parties' exceptions and the responses thereto. The ALJ's proposed decision is well-reasoned, adequately supported by the record and in accordance with applicable law and, therefore, we adopt the ALJ's findings of fact and conclusions of law as the findings of the Board itself. However, we augment the ALJ's proposed remedy and order for the District's refusal to bargain in good faith.

PROCEDURAL HISTORY

On November 10, 2010, CSEA filed an unfair practice charge against the District alleging a violation of EERA section 3543.5(a), (b) and (c). On January 20, 2012, PERB's Office of the General Counsel issued a complaint. On February 10, 2012, the District filed an answer to the complaint admitting the jurisdictional allegations, but denying all others. The District also asserted several affirmative defenses.

On March 7, 2012, the parties met for an informal settlement conference but the matter was not resolved. A formal hearing was held on June 10, 2012, at PERB's Los Angeles Regional Office. At the conclusion of CSEA's case-in-chief, the District declined to present its case-in-chief, the record was closed and the matter was submitted for decision.

On October 12, 2012, the ALJ issued his proposed decision. On October 30, 2012, the District filed exceptions to the proposed decision and a request for oral argument. On November 19, 2012, CSEA filed a response to the District's exceptions along with its own

exceptions and an opposition to the District's request for oral arguments.[2] On December 4, 2012, the District filed a response to CSEA's exceptions.

FACTUAL SUMMARY

Sometime in February 2010, District Superintendent Rick Kemppainen (Kemppainen) told CSEA President Diane St. Claire (St. Claire) that the District was considering closing Las Flores and that there may be layoffs as a result. On February 12 and 25, 2010, CSEA notified the District that it wished to meet and negotiate over the potential effects of the layoffs resulting from the Las Flores closing. The District did not respond to CSEA's bargaining demand. (Proposed Dec., p. 3.) On March 9, 2010, District Associate Superintendent Marcy Delgado (Delgado) sent CSEA a request that CSEA submit a bargaining proposal regarding the layoffs. (*Ibid.*)

On May 6, 2010, the District's Board of Education (School Board) voted to abolish twenty (20) positions at Las Flores due to "Lack of Work/Funds School Closure" effective June 30, 2010.[3] Sometime in late May or early June of 2010, CSEA held a meeting with its members. At this meeting, St. Clair and CSEA Labor Relations Representative Beverly Johnson (Johnson) viewed layoff notices from the District received by some of the bargaining unit members who worked at Las Flores. On May 21, 2010, Johnson sent

[2] The District's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties have had an opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Los Angeles Community College District* (2009) PERB Decision No. 2059; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

[3] In its exceptions, CSEA claims that the District eliminated 17 positions in 10 classifications. The document which was admitted into evidence at hearing abolishes 20 classified positions in 13 classifications at Las Flores.

Kemppainen a letter notifying him that Johnson and the CSEA negotiating team would like to meet regarding the effects of the layoffs. (*Ibid.*)

On June 4, 2010, Delgado sent Johnson a letter maintaining that the District "only has an obligation to meet and confer on the layoff process, not an obligation to negotiate."[4] On June 17, 2010, Johnson sent Kemppainen another bargaining demand together with a proposed memorandum of understanding which included several proposals on the foreseeable effects of layoffs. The District did not respond to Johnson's letter. (*Id.* at p. 4.)

On July 15, 2010, Johnson sent the District another bargaining demand and notified the District that CSEA was available to meet on any date in August of 2010 except for the 5th, 11th, 17th, and 26th. On July 22, 2010, the District notified Johnson that it was available to meet on August 17, 2010. On August 9, 2010, CSEA told the District it was available to meet on August 17, 2010. On August 12, 2010, Kemppainen notified CSEA Labor Relations Specialist Shannon Medrano that it was no longer available on August 17, 2010, and requested more dates to "meet and confer regarding the reduction in work force." The parties never met and negotiated over the effects of the Las Flores layoff decision. (*Ibid.*)

PROPOSED DECISION

On October 12, 2012, the ALJ issued his proposed decision. The ALJ determined that the District had a duty to bargain in good faith because the evidence established that the School Board voted to abolish classified positions at Las Flores and to issue layoff notices to CSEA

[4] Delgado did not explain either in his letter or at hearing how he understood "meet and confer" to be a different, and presumably lesser, duty than "meet and negotiate." Regardless, "meet and confer" does not appear in EERA, but it is the term used in the Meyer-Milias-Brown Act (Gov. Code, § 3500 et seq.), the Dills Act (Gov. Code, § 3512 et seq.) and the Higher Education Employer-Employee Relations Act (Gov. Code, § 3560 et seq.) to describe the duty to bargain. There is no difference between "meet and confer" and "meet and negotiate." EERA does not specify a separate duty to "meet and confer" that is inferior to, less formal than, or less binding than the duty to "meet and negotiate."

bargaining unit members. The ALJ also determined that CSEA had submitted a valid effects bargaining demand which identified several subjects within the scope of representation.

The ALJ then applied PERB's test for surface bargaining and concluded that based on the totality of its conduct, the District violated its duty to bargain in good faith. However, the ALJ also concluded that the School Board's May 6, 2010, decision to abolish positions at Las Flores and its issuance thereafter of layoff notices was "not sufficient to establish that the District actually laid anyone off." (Proposed Dec., p. 11.) Therefore, the ALJ dismissed CSEA's charge that the District unilaterally implemented a layoff. The ALJ also determined that there was insufficient evidence that the District "implemented, or even contemplated a reduction in unit member hours." (*Id.* at p. 12.) Accordingly, the ALJ dismissed CSEA's allegation that the District violated the duty to bargain over a decision to reduce bargaining unit member hours.

The ALJ determined that CSEA did not prove that layoffs actually occurred over the Las Flores closing and he declined to issue the make-whole remedy requested by CSEA. Instead, the ALJ ordered the District to bargain upon request with CSEA over the effects of proposed layoff and to cease and desist from: (1) refusing to bargain with CSEA over the foreseeable impact of proposed layoffs; (2) denying classified employees the right to be represented by CSEA; and (3) denying CSEA the right to represent its bargaining unit members.

EXCEPTIONS

Both parties' timely submitted exceptions to the ALJ's proposed decision and responses to the opposing party's exceptions. The District takes two exceptions to the ALJ's proposed decision: (1) the ALJ erred in concluding that the District had any duty to bargain because the evidence failed to establish that a layoff occurred; and (2) the ALJ relied on inadmissible

hearsay evidence in determining that the District proposed layoffs, closed Las Flores and abolished classified positions.

CSEA also takes two exceptions to the proposed decision: (1) the ALJ erred in determining that there was insufficient evidence that the District actually laid-off any classified employees as a result of the May 6, 2010 School Board action; and (2) the ALJ erred in rejecting a make-whole remedy.

DISCUSSION

Essentially, the District maintains that the ALJ erred in ruling that it had a duty to bargain, while CSEA maintains that the ALJ erred in giving an inadequate remedy. We shall first discuss the law regarding when the duty arises to bargain the effects of non-negotiable management decisions; and the District's exception to the ALJ's findings supporting the conclusion that it had a bargaining duty. We shall then address the ALJ's remedy.

The Duty to Bargain Effects of Non-Negotiable Management Decisions

It is well-settled that the decision to close a facility or to lay off employees is not subject to bargaining, but the effects of that decision on matters within the scope of representation are negotiable. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373 (*Mt. Diablo*).) Once an employer makes a firm decision to act on a matter within its managerial prerogative, a duty arises to provide the exclusive representative with notice and an opportunity to negotiate the effects of that decision. (*Ibid.*) Once the exclusive representative has received notice of that firm decision it must make a valid request to bargain. (*Ibid.*)

An exclusive representative need not "recite a formulaic phrase, but may express its request in any form that conveys its desire to meet and confer or negotiate about a matter within the scope of representation." (*County of Sacramento* (2013) PERB Decision No. 2315-M.) When only the effects of a proposed change are negotiable, the exclusive representative

must indicate in its demand that it seeks to negotiate over effects and not the decision itself. (*Ibid.*, see also *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 [although not essential that a request to negotiate be specific or made in a particular form it is important for the charging party to have signified some desire to negotiate]; *Mt. Diablo, supra,* PERB Decision No. 373 [demand to negotiate "any and all impacts upon members of . . . bargaining unit in any and all mandatory subjects for negotiation" of layoff decision is sufficient].)

More recently, the Board has held that:

> Although the request need not be in any particular form nor use a particular verbiage, it must clearly identify negotiable areas of impact, and clearly indicate the employee organization's desire to bargain over the effects of the decision as opposed to the decision itself.

(*Trustees of the California State University* (2012) PERB Decision No. 2287-H, p. 11.) In balancing the employer's duty to negotiate with the employer's right to be informed of the union's specific bargaining demands, the Board has stated:

> The resolution we find to be both practical and consistent with the give-and-take of the bargaining process is to utilize that process itself to resolve the ambiguities present in bargaining proposals.

(Emphasis in original.) (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 9.) Thus, before an employer may refuse to negotiate after receiving an effects bargaining demand, it "must attempt to clarify through discussions with the union any uncertainty as to what is proposed for bargaining and whether it falls within the scope of representation." (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 5.)

In the case before us, we agree with the ALJ that the District had a duty to bargain in good faith upon receiving from CSEA a demand to bargain effects which identified subjects within the scope of representation. Even if the District disagreed or was unclear as to whether some proposed subjects for bargaining were within the scope of representation, it still had a duty to meet with CSEA to clarify the matter. This is so regardless of whether the District ever actually closed Las Flores or implemented the layoffs. Once the District made a firm decision to close Las Flores and, subsequently, received a valid effects bargaining demand, the duty to bargain in good faith over the effects of that decision arose. (*Newark Unified School District, Board of Education* (1982) PERB Decision No. 225 [the District had a negotiating obligation at the time it proposed the layoff, even though the full extent to which the layoff would ultimately be implemented was unknown at the time].) Moreover, even if the classified positions to be abolished by the action taken at the May 6, 2010, School Board meeting did not result in layoffs, reductions in work hours, reductions in pay, or the closing of Las Flores, the District was still required to meet with CSEA to seek clarification. Therefore, we conclude that the District's first exception, that it had no duty to bargain because CSEA did not prove that layoffs occurred, lacks merit.

District's Hearsay Exceptions

PERB Regulation 32176[5] describes the rules of evidence adhered to in unfair practice charge hearings and provides that:

> Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

[5] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Hearsay evidence is defined as:

> Evidence of a statement made out of court and offered to prove the truth of the matter stated. Unless it comes within one of the established exceptions to the hearsay rule, evidence of this type is inadmissible.

(1 Witkin, California Evidence (5th ed. 2012) Hearsay § 1, p. 783.) The District takes exception to the ALJ's admission into evidence of a document described as the School Board's May 6, 2010, action item regarding the "DISCONTINUANCE OF SERVICE OF CLASSIFIED PERSONNEL" (School Board Action Item) and to admission of testimony by CSEA witnesses regarding layoff notices.

We agree that the ALJ properly admitted into evidence the School Board Action Item which described the CSEA bargaining unit positions at Las Flores to be eliminated due to "Lack of Work/Funds School Closure." According to the ALJ, the document is admissible under two exceptions to the hearsay rule: party admissions and official records. In addition, St. Clair testified that she attended the May 6, 2010, School Board meeting and witnessed the School Board members voting to approve the action item regarding the closure of Las Flores and abolition of the classified positions.

In order to be admissible under the official record exception, three conditions must be met:

> (1) The writing was made by and within the scope of duty of a public employee;
>
> (2) The writing was made at or near the time of the act, condition, or event; and
>
> (3) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

(Evid. Code, § 1280.)

At hearing, the District raised no objection to the authenticity of the document or to foundation. We conclude with the ALJ that the School Board Action Item was made by and within the scope of duty of a District employee; was made on or about May 6, 2010; and is a source of information which can be relied on to demonstrate the action taken by the School Board regarding the classified positions at Las Flores described therein. Thus, we agree with the ALJ that the School Board Action Item was admissible for all purposes under the official records exception to the hearsay rule.

Under the party admission exception to the hearsay rule:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

(Evid. Code, § 1220.) Party admissions are admissible because the rationale for excluding hearsay:

> Cannot reasonably be invoked by a party who is present and can testify in explanation or contradiction of the prior statement or conduct.

(1 Witkin, California Evidence (5th ed. 2012) Hearsay, § 91(2), p. 915.) In the case before us, the District was provided the opportunity but did not present its own witnesses. The District therefore never availed itself of the opportunity to contradict or explain the information contained in the School Board Action Item. We conclude that the ALJ properly admitted the School Board Action Item for all purposes under the party admission exception to the hearsay rule.

With regard to the testimonial evidence of layoff notices, however, no writing was offered into evidence. The only evidence was the testimony of St. Clair and Johnson who each testified that they reviewed at a CSEA meeting the 45-day layoff notices that had been

received by some CSEA bargaining unit members. The ALJ concluded that the testimony about the layoff notices was admissible under the party admission and public records exceptions to the hearsay rule. We agree only in part.

We are reticent to conclude that the official record exception can be applied in the absence of a writing. Johnson testified that in late May or early June of 2010, she saw layoff notices signed by Delgado which had been received by CSEA bargaining unit members. However, no copy was proffered as evidence. We conclude the record was not sufficient to support a finding that the layoff notices seen by CSEA officials qualify as official records of the District.

However, we conclude that the ALJ could consider this evidence as a party admission over objection by the District that it was hearsay. As with the School Board Action Item, the District had the opportunity to present testimony or documentary evidence to explain or contradict CSEA's evidence of the layoff notices. Indeed, the person alleged to have authored the notices was the District's representative in attendance at the hearing. In its exception, the District argues only that the layoff notice is not an admission. We deny the District's exception and find that the ALJ properly admitted for all purposes the testimonial evidence describing the layoff notices.

The Layoffs and Unilateral Change

Although we conclude that there was sufficient evidence that in May of 2010, the District made a firm decision to close Las Flores and abolish classified positions represented by CSEA, and thereafter issued layoff notices to some classified employees who had been employed at Las Flores, we agree with the ALJ's determination that CSEA failed to prove that any layoffs actually occurred. The ALJ relied on *State of California (Department of Corrections & Rehabilitation, Department of Personnel Administration)* (2010) PERB

Decision No. 2115-S for the proposition that "the District Board item closing Las Flores Elementary School and the layoff notices issued are not sufficient to establish that the District actually laid anyone off." (Proposed Dec., p. 11.) We conclude with the ALJ that the School Board Action Item and the layoff notices are insufficient to demonstrate that the District implemented layoffs at the end of the 2009-2010 school year.

Remedy

We also affirm the ALJ's decision that CSEA failed to establish a unilateral reduction of work hours and that a traditional make-whole remedy, such as the one sought by CSEA—including reinstatement and back-pay for the classified employees who suffered loss of work—is inappropriate in this matter. Such a remedy "would effectively negate the principle that the layoff decision is one reserved for the employer." (*Kern Community College District* (1983) PERB Decision No. 337 (*Kern*), p. 14.) As the Board stated in *Oakland Unified School District* (1983) PERB Decision No. 326 (*Oakland*), reinstatement of laid-off employees "would accomplish more than the District was ever required to do" because reinstatement would rescind a decision the District was entitled to make. However, while the Board in *Oakland* did not order a make-whole remedy for the District's failure to negotiate over the effects of a layoff decision, neither did it leave the union with no remedy or an empty bargaining order.

The District failed and refused to bargain in good faith over the impact of its May 6, 2010, action to close Las Flores and abolish classified positions represented by CSEA. We agree with the ALJ, therefore, that an order that the District meet and negotiate with CSEA over the effects of its May 2010, decision to close Las Flores and abolish classified positions is appropriate. However, the ALJ's bargaining order is insufficient to remedy the District's unlawful conduct. The ALJ rejected CSEA's request for a make-whole remedy based on

CSEA's failure to prove that an unlawful layoff occurred. The Board in *Oakland, supra,* PERB Decision No. 326 also rejected the make-whole remedy, including reinstatement, that the ALJ in that case had proposed. The Board noted in *Oakland* that reinstatement with back-pay was not appropriate because reinstatement of laid-off employees would interfere with the employer's right to make the layoff decision. We concur. Nevertheless, because the district in *Oakland* violated EERA by failing to meet and negotiate over the effects of the layoff decision, the Board imposed a limited back-pay remedy to run if and while the parties bargained over the effects of the non-negotiable decision. (*Oakland,* at pp. 47-49.) We shall do so here as well.

In order to assure meaningful bargaining and effectuate the purposes of EERA, we shall accompany our order to bargain over the effects of the District's May 6, 2010 decision

> with a limited backpay requirement designed both to make-whole employees for losses suffered as a result of the violation and recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences.

(*Transmarine Navigation Corporation* (1968) 170 NLRB 389 (*Transmarine*).)[6]

Accordingly, we shall order the District to meet and negotiate with CSEA, upon the submission of CSEA's proposals addressing the negotiable effects of the District's May 2010 decision to close Las Flores and abolish classified positions and to compensate at their normal rate, any CSEA bargaining unit members who were affected by the layoff. CSEA shall submit

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[6] As the Board stated in *The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H, p. 4:

> A Transmarine remedy is a limited backpay award that attempts to approximate the parties' bargaining positions had there been no violation. (Placentia Unified School District (1986) PERB Decision No. 595 at p. 11.) In short, the Transmarine backpay award begins after the issuance of a decision and continues during the pendency of effects negotiations. (Id. at p. 13.)

(Emphasis in original.)

its bargaining proposals within 20 days following the service of this decision and order. Should CSEA fail to submit such proposals within this twenty (20)-day time frame, this limited backpay remedy shall not go into effect. Provided CSEA submits its proposals, payments shall remain in effect until the earliest of the following conditions: (1) the date the parties' reach an agreement on those subjects pertaining to the effects of the May 2010, decision by the District School Board to close Las Flores and abolish classified positions; (2) the parties' exhaust the negotiating and impasse procedures prescribed by EERA; (3) subsequent failure by CSEA to bargain in good faith. (See also *Kern, supra,* PERB Decision No. 337, at p. 15 and *Mt. Diablo, supra,* PERB Decision No. 373, at p. 73 [both cases applying the *Transmarine, supra,* 170 NLRB 389 remedy for failure to bargain effects under EERA].)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by failing to bargain in good faith with the California School Employees Association and its Chapter 32 (CSEA) over the effects of its May 2010 decision to close Las Flores Elementary School (Las Flores) and abolish classified positions.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to bargain in good faith with CSEA over the foreseeable impacts of the closure of Las Flores and the abolishment of classified positions;

2. Denying classified bargaining unit members the right to be represented by CSEA;

3. Denying CSEA the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Within twenty (20) days of the service of a final decision in this matter, meet and negotiate in good faith with CSEA, upon receipt of CSEA's proposals addressing the foreseeable effects of the May 2010, decision to close Las Flores and abolish classified positions.

2. Compensate at their normal rate, any CSEA bargaining unit members who were affected by layoffs resulting from the May 6, 2010, decision by the District's Board of Education (School Board) to close Las Flores and abolish classified positions. CSEA shall submit its bargaining proposals within twenty (20) days following the service of this Decision and Order. Should CSEA fail to submit such proposals within this twenty (20)-day time frame, this limited backpay remedy shall not go into effect. Provided CSEA submits its proposals, payments shall remain in effect until the earliest of the following conditions: (1) the date the parties' reach an agreement on those subjects pertaining to the effects of the May 2010, decision by the District School Board to close Las Flores and abolish classified positions; (2) the parties' exhaust the negotiating and impasse procedures prescribed by EERA; or (3) subsequent failure by CSEA to bargain in good faith.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the CSEA bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered

with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit represented by CSEA. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

All other allegations in Case No. LA-CE-5508-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-5508-E, *California School Employees Association & its Chapter 32 v. Bellflower Unified School District,* in which all parties had the right to participate; it has been found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by failing to bargain in good faith with the California School Employees Association and its Chapter 32 (CSEA) over the effects of its May 2010, decision to close Las Flores Elementary School (Las Flores) and abolish classified positions.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to bargain in good faith with CSEA over the foreseeable impacts of the closure of Las Flores and the abolishment of classified positions;

2. Denying classified bargaining unit members the right to be represented by CSEA;

3. Denying CSEA the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Within twenty (20) days of the service of a final decision in this matter, meet and negotiate in good faith with CSEA, upon receipt of CSEA's proposals addressing the foreseeable effects of the May 2010, decision to close Las Flores and abolish classified positions.

2. Compensate at their normal rate, any CSEA bargaining unit members who were affected by layoffs resulting from the May 6, 2010, decision by the District's Board of Education (School Board) to close Las Flores and abolish classified positions. CSEA shall submit its bargaining proposals within twenty (20) days following the service of this decision and order. Should CSEA fail to submit such proposals within this twenty (20)-day time frame, this limited backpay remedy shall not go into effect. Provided CSEA submits its proposals, payments shall remain in effect until the earliest of the following conditions: (1) the date the parties reach an agreement on those subjects pertaining to the effects of the May 2010, by the District School

Board to close Las Flores and abolish classified positions; (2) the parties' exhaust the negotiating and impasse procedures prescribed by EERA; or (3) subsequent failure by CSEA to bargain in good faith.

Dated: _____ BELLFLOWER UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 32, Charging Party, v. BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5508-E PROPOSED DECISION (10/12/2012)

Appearances: Janet Jones, Senior Labor Relations Representative, and Brian Lawler, Labor Relations Representative, for California School Employees Association and its Chapter 32; Law Offices of Eric Bathen by Eric Bathen, Marcia P. Brady, and Jordan Meyer, Attorneys, for Bellflower Unified School District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that a public school employer violated the Educational Employment Relations Act (EERA) by refusing to bargain over the effects of proposed layoffs and the decision to reduce employee hours.[1] The employer denies that it violated EERA.

On November 10, 2010, California School Employees Association and its Chapter 32 (CSEA) filed an unfair practice charge against Bellflower Unified School District (District) alleging a violation of EERA section 3543.5(a), (b), and (c). On January 20, 2012, the PERB Office of the General Counsel issued a complaint. On February 10, 2012, the District filed an answer to the PERB complaint admitting only the jurisdictional allegations and denying all others. The District also asserted multiple affirmative defenses.

[1] EERA is codified at Government Code section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On March 7, 2012, the parties participated in an informal settlement conference but the matter was not resolved. A formal hearing was held on June 10, 2012. During the hearing, the District declined the opportunity to present a case-in-chief. On September 24, 2012, the parties filed simultaneous closing briefs. At that point, the record was closed and the matter was submitted to PERB for decision.

FINDINGS OF FACT

The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). CSEA is an exclusive representative within the meaning of EERA section 3540.1(e), and represents the District's classified employees bargaining unit. The parties were signatories to a Collective Bargaining Agreement (CBA) that was in effect by its own terms from July 1, 2007 through June 30, 2010. The CBA did not contain any provisions regarding layoffs or reductions in hours.

The District's Personnel Commission Rules

The District has adopted Personnel Commission Rules (PCR) for classified employees, whose stated purpose is to establish "a sound and equitable program within the District for the administration of the merit system." The PCR includes provisions covering layoffs. PCR 10.100 defines "layoff" as a "[s]eparation from a permanent position because of lack of work or lack of funds or because an employee has exhausted all leave privileges through illness or injury." PCR 60.800 describes procedures to be followed during a layoff, such as the order of layoffs and placement on a reemployment list. PCR 60.800.2(D) also references the need to notify affected employees 45 days before enacting a layoff.

Closure of the Las Flores Elementary School Site

In February 2010, District Superintendent Rick Kemppainen told CSEA president

Diane St. Clair that that the District was considering closing Las Flores Elementary School and that the closure might result in layoffs. On February 12, 2010, St. Clair informed Kemppainen that CSEA "demands to meet and to negotiate the potential effects of the lay offs [sic] by closing Las Flores Elementary." St. Clair did not identify any specific effects at that time. Kemppainen did not respond. CSEA vice president Sue Vandenhoek reiterated CSEA's request on February 25, 2010. On March 9, 2010, District Associate Superintendent of Business and Personnel Services Marcy Delgado sent CSEA an e-mail message requesting that CSEA submit an initial layoff proposal.

On May 6, 2010, the District Board of Education addressed a board item concerning "DISCONTINUANCE OF SERVICES OF CLASSIFIED PERSONNEL." That board item identified 13 classified positions to be eliminated at Las Flores Elementary due to "Lack of Work/Funds School Closure."[2] The positions were scheduled to be eliminated effective June 30, 2010. The District board item was approved.

After the District board meeting, CSEA held a meeting for bargaining unit members in May 2010. St. Clair and CSEA Labor Relations Representative Beverly Johnson attended the meeting. Around 10 bargaining unit members, some of which were assigned to work at Las Flores, informed Johnson that they received layoff notices issued by Delgado. St. Clair and Johnson both personally viewed some of those notices. Neither knows of any employee that was laid off or reduced in hours.

On May 21, 2010, Johnson sent a letter to Kemppainen stating that CSEA had received notice of the District's intent to lay off certain bargaining unit employees. The letter continued:

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[2] The term "Lack of Work/Funds corresponds to language used the language in Education Code authorizing school districts to layoff classified employees. (Educ. Code, § 45308(a) ["Classified employees shall be subject to layoff for lack of work or lack of funds."].)

> Therefore, CSEA hereby submits our intent to negotiate the effects of all proposed layoffs concerning bargaining unit employees, including the right to negotiate over the effects of workload issues caused by layoff and/or reduction in hours or work year.
>
> Further, in the event the District proposes to reduce bargaining unit positions whether vacant or otherwise occupied by bargaining unit employees, it is our intent to bargain the decision of said reductions. At this time, we propose there be no reductions.
>
> CSEA also requests that the District cease and desist from implementing its layoff and/or reduction of bargaining unit employees/positions until we complete our negotiations on this subject.

CSEA offered to meet during the week of June 7, 2010.

On June 4, 2010, Delgado sent Johnson a letter stating that the District had an obligation to "meet and confer, not an obligation to negotiate as you stated in your letter dated May 21, 2010." Delgado also stated that the District could not negotiate over proposals that had not gone through public posting or "sunshine" requirements under EERA section 3547.

On June 17, 2010, Johnson sent Kemppainen a letter renewing its demand to bargain over both the effects of layoffs and the decision to reduce hours to unit positions. Johnson included a proposed Memorandum of Understanding (MOU) including proposals on foreseeable effects of the layoff such as notice to employees, medical and leave benefits, the handling of bargaining unit work, and reemployment rights. The District did not respond.

On June 15, 2010, CSEA again requested to begin meeting and offered any date in August 2010, except August 5, 11, 17, and 26. The District offered to meet on August 17, 2010. CSEA then said it was available to meet that day, but the District stated that it was no longer available. On August 17, 2010, CSEA offered additional dates for meeting. There is no record that the District responded and no meeting ever occurred.

ISSUE

1. Did the District violate the duty to bargain over the effects of proposed layoffs?

2. Did the District violate the duty to bargain over a reduction in hours?

CONCLUSIONS OF LAW

1. The District's Duty to Bargain Over Layoffs

"PERB has long held that the decision to implement a layoff of employees is a fundamental management prerogative over which the employer is not obligated to bargain." (*State of California (Department of Corrections & Rehabilitation, Department of Personnel Admin.)* (2010) PERB Decision No. 2115-S (*State of CA*), citing *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, other citations omitted.) However, as with other non-negotiable decisions, the employer has a duty to bargain over any negotiable effects arising out of the decision to lay off. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373 (*Mt. Diablo USD*).)

In discharging this duty, the employer must notify affected bargaining representatives of proposed layoffs "sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate." (*Victor Valley Union High School District* (1986) PERB Decision No. 565.) Furthermore, "'once the decision is made the employer must respond to requests to negotiate in a manner consistent with its duty to bargain in good faith.'" (*Trustees of the California State University* (2012) PERB Decision No. 2287-H (*CSU*),[3] quoting *The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H.)

The employer is not, however, required to engage in negotiations over purely speculative effects of the layoff. (*Mt. Diablo USD*, *supra*, PERB Decision No. 373.)

[3] At the time this Proposed Decision issued, this decision was still subject to appeal under Government Code section 3564(b).

Accordingly, the exclusive representative must identify specific impacts that foreseeably affect employee working conditions. (*CSU, supra*, PERB Decision No. 2287-H; *Pasadena Area Community College District* (2011) PERB Decision No. 2218.)

In *Newark Unified School District, Board of Education* (1982) PERB Decision No. 225 (*Newark USD*), PERB held that an employer "had a negotiating obligation at the time it *proposed* [a] layoff, even though the full extent to which the layoff would ultimately be implemented was unknown at that time." (Emphasis added.) PERB reached a similar conclusion in *State of CA, supra*, PERB Decision No. 2115-S. There, the employer notified the union that it was closing two juvenile detention facilities in approximately four months and that the closure would result in the elimination of bargaining unit positions. The employer then sent notices to employees in those two facilities that they were designated as "surplus" and invited them to seek out vacant positions. The Board found that the employer's conduct triggered the duty to engage in effects bargaining upon a proper request from the union. (*Ibid.*)

The District's actions in this case are similar to the facts in *State of CA, supra*, PERB Decision No. 2115-S. On May 6, 2010, the District approved a District board item to close Las Flores Elementary and issued layoff notices to classified personnel.[4] No evidence was produced that refutes these facts. This is sufficient to demonstrate that the District was, at least, proposing layoffs even if the ultimate outcome of that proposal was still unknown. Less than a month later, CSEA demanded to bargain the effects of the layoffs, including workload.

[4] The District argues that evidence of the District board item and the layoff notices are hearsay. PERB Regulation 32176 states that hearsay evidence "is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." In this case, because the documents in question were authored by District human resources representatives and contain statements that tend to both prove CSEA's case and disprove the District's defense, evidence of the statements made in these documents should be admissible as party admissions and as public records. (See Evid. Code, §§ 1220, 1280; *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 738-739; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221.)

CSEA later drafted a proposal identifying multiple other subjects within the scope of representation, including hours, benefits, and reemployment rights. (Gov. Code,, § 3543.2(a); *San Mateo City School District* (1984) PERB Decision No. 383; *Palo Verde Unified School District* (1983) PERB Decision No. 321.) It is foreseeable that each of these issues could be adversely affected by the District's proposal to close a school site, eliminate 13 bargaining unit positions, and conduct layoffs. Based on these facts, the District was required to bargain with CSEA in good faith. (See *State of CA*; *Newark USD*, *supra*, PERB Decision No. 225.)

PERB utilizes either a "per se" or a "totality of the circumstances" test to determine whether an employer has violated its duty to negotiate in good faith, depending on the specific conduct involved. (*Stockton Unified School District* (1980) PERB Decision No. 143.) In this case, the PERB complaint is worded in such a way that it could be asserting a violation under both a "totality of the circumstances" and a "per se" theory. Both will be discussed below.

a. Surface Bargaining

It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) The Board considers the parties' bargaining conduct as a whole to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275.) There are many indicia of surface bargaining. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (*Oakland Unified School District*

(1983) PERB Decision No. 326 (*Oakland USD*).) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (*Ibid.*)

While a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Oakland Unified School District*, *supra*, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

In *State of CA*, *supra*, PERB Decision No. 2115-S, the parties met six times, offered proposals, but could not come to agreement. PERB found that both parties were unwilling to yield in their mutually exclusive positions which, in and of itself, was not evidence of bad faith. Accordingly, the case was dismissed. (*Ibid.*) The Board conducted a similar analysis but reached a different conclusion in *Oakland Unified School District* (1985) PERB Decision No. 540. There, the employer approved a layoff plan but did not reveal the plan to the union until after it made a public announcement. The employer also provided the union with inadequate information about the affected employees and improperly denied the union's request to combine negotiations over the impacts of the layoff with successor agreement negotiations. (*Ibid.*) The Board found that the totality of the employer's conduct demonstrated that it lacked the intent to reach an agreement over the effects of the proposed layoff. (*Ibid.*)

Here, the evidence shows that the District intended to delay, and ultimately avoid, its obligations to meet and negotiate with CSEA over the impacts of its proposed layoffs. The District never responded to CSEA's first request for negotiations on February 12, 2010. After making subsequent requests to bargain, the District demanded that CSEA provide a written proposal to satisfy public notice requirements. After CSEA complied and again requested negotiations, the District did not reply. CSEA renewed its request to bargain around a month

later, in July 2010. The District replied to this demand, but would only meet on a day that CSEA previously said was unavailable. When CSEA made itself available that day, the District again declined to meet. CSEA offered additional dates but, as of close of the hearing, the parties have never met. Based on these facts, it is concluded that the District made no good faith attempt to meet with CSEA over the impacts of the layoff, which is evidence of unlawful surface bargaining. (*Oakland USD*, *supra*, PERB Decision No. 326.)

As further evidence of its intent to delay the process, Associate Superintendent of Business and Personnel Services Delgado asserted that the District "has only an obligation to meet and confer on the layoff process, not an obligation to meet and negotiate as stated in your letter." PERB uses the terms "meet and confer" and "meet and negotiate" interchangeably under EERA to mean the duty to bargain in good faith until agreement or impasse. (See Gov. Code, § 3540.1(h); *Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712.) These inaccurate legal assertions are further evidence that the District did not take its obligations to respond to CSEA's requests for negotiations seriously.

In addition, the record shows that the District failed to offer any counterproposal to CSEA's June 17, 2010 proposal. It did not ever acknowledge that it had any bargaining obligation. An employer's "flat refusal to reconcile differences by failing to offer counterproposals could be construed to be bad faith if no explanation or rationale supports the employer's position. (*Oakland Unified School District* (1981) PERB Decision No. 178.) On the other hand, the refusal to offer a counterproposal, when supported by rational arguments, is more akin to lawful hard bargaining. (*Regents of the University of California* (2010) PERB Decision No. 2094-H.) In this case, the District offered no explanation to CSEA for declining to make a counterproposal. The District likewise offered no explanation during the course of

the PERB hearing or in its closing brief. Accordingly, without any rationale for the District's conduct, this is further evidence of bad faith bargaining.

The District does not refute these facts, but instead argues that no duty to bargain arose in this case because CSEA failed to prove that the District actually implemented a layoff. This position is unpersuasive because there is a duty to bargain over effects "reasonably likely to occur, not proven to have already occurred." (*CSU*, *supra*, PERB Decision No. 2287-H; see also *Newark USD*, *supra*, PERB Decision No 225, [holding duty to bargain arose when employer proposed, not implemented, a layoff].) The Board in *CSU* stated:

> Where the employee organization has made a timely demand for bargaining on an issue within the scope of bargaining, like workload, the employer has the following three choices: (1) accede to the demand and address the employee organization's concerns in negotiations; (2) ask the employee organization for its negotiation justification; or (3) refuse the employee organization's demand. In choosing the third option, the employer does so at its peril if its refusal is later determined to be unjustified.

The District took the third option, which was unjustified under these facts because there was sufficient evidence to conclude that the District was proposing layoffs and because CSEA made a timely demand to bargain over specific negotiable effects. Thus, the District had a duty to bargain over the proposed layoffs. The District unreasonably delayed the process of scheduling and meeting with CSEA. It also failed to make any counterproposals to CSEA's initial proposal. Based on the totality of its conduct, it is concluded that the District lacked the subjective intent to engage in any meaningful bargaining over the effects of its decision to lay off bargaining unit members. This is a violation of the duty to bargain in good faith.

b. Unilateral Implementation of the Layoff

CSEA also contends that the District unilaterally implemented the layoff prior to completing the necessary effects bargaining. To establish an unlawful unilateral change, the

charging party must show that: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change has a generalized effect or continuing impact upon terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation. (*San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

In *State of CA*, *supra*, PERB Decision No. 2115-S, the Board found that the notifications to the union and to members were not sufficient to establish that the employer actually laid anyone off. Rather, PERB held that those notices "merely informed [the union] and affected employees of its layoff decision, which was not negotiable, and offered to negotiate the effects of the layoff." (*Ibid.*)

As in *State of CA*, *supra*, PERB Decision No. 2115-S, the District board item closing Las Flores Elementary School and the layoff notices issued are not sufficient to establish that the District actually laid anyone off. No witness or other evidence provided further detail on this issue. In fact, both St. Clair and Johnson admitted to not knowing whether any unit member was laid off. Therefore, CSEA has not established that the District unilaterally implemented a layoff. This allegation is therefore dismissed.

2. The District's Duty to Bargain Over a Reduction in Hours

CSEA also alleges that the District failed to bargain over a reduction in unit member hours. Unlike the decision to lay off, the decision to reduce hours is an issue within the scope of representation that an employer may not implement prior to giving notice and the

opportunity to complete negotiations to the appropriate bargaining representative. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078.)

In this case, CSEA has not proven that the District implemented, or even contemplated, a reduction in unit member hours. Unlike with the proposed layoff, the May 6, 2010 District board item did not mention any reduction to unit member hours. Likewise, there was no evidence presented that the layoff notices informed any member of a reduction in hours. No witness testified that his or her hours were ever reduced.

CSEA representative Johnson apparently believed that unit members had their hours reduced as a result of the above-mentioned layoff proceedings. Johnson testified that unit members told her of possible reductions. As with the layoff itself, Johnson said she did not know whether any unit members had their hours reduced. Johnson's testimony about other employees' statements is not specific enough to establish that a reduction in hours was either proposed or implemented. Even if it was, that testimony would be hearsay which is insufficient to independently establish a matter of fact. (See Cal. Code Regs., tit. 8, § 32176, *County of Riverside* (2009) PERB Decision No. 2090-M.)[5] Therefore, CSEA has not established that the District violated its duty to negotiate in good faith over a reduction in hours. This allegation is therefore dismissed.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) states:

[5] Unlike with the May 6, 2010 District board item and the layoff notices authored by Delgado, employees' statements to Johnson do not qualify as a "party admission" under Evidence Code section 1220 because those statements were not made by a District representative. No evidence was presented that the "layoff notices" included a statement that the District was implementing a reduction in hours.

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Having found that the District failed to negotiate in good faith, it is appropriate to order the District to cease and desist from conduct which violates EERA and to bargain in good faith over the impacts of its proposed layoff upon request from CSEA. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270.)

CSEA also requests a "make whole remedy," for conduct resulting from the District's layoff, citing to *Oakland Unified School District*, *supra*, PERB Decision No. 326. In that case, the Board ordered a monetary remedy "to compensate those employees improperly laid off" by the employer. This case is distinguishable because CSEA never established that any employees were "improperly laid off" by the District. Accordingly, such a remedy is not appropriate here. (See *Newark USD*, *supra*, PERB Decision No. 225, [declining to issue a return to status quo where impacts of the proposed layoff remained speculative].)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3453.5(a), (b), and (c). The District violated the Act by failing to bargain in good faith over the foreseeable impacts of proposed layoffs. All other allegations are dismissed.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to bargain with California School Employees Association and its Chapter 32 (CSEA) in good faith over the foreseeable impacts of proposed layoffs;

2. Denying classified bargaining unit members the right to be represented by CSEA; and

3. Denying CSEA the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within 10 workdays of the service of a final decision in this matter, meet and negotiate in good faith with CSEA, upon request, over the issue of proposed layoffs;

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to classified employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material; and

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the

Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Eric J. Cu
Administrative Law Judge